**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **BEVERLY D. MCGRADY** | ) | |
| Claimant | ) | |
| VS. | ) | |
| | ) | Docket No. 199,358 |
| **DELPHI AUTOMOTIVE SYSTEMS** | ) | |
| Respondent | ) | |
| Self-Insured | ) | |
| | ) | |
| AND | ) | |
| | ) | |
| **KANSAS WORKERS COMPENSATION FUND** | ) | |

## ORDER

On February 17, 1998, the Application of the Workers Compensation Fund (Fund) for review by the Workers Compensation Appeals Board of an Award entered by Administrative Law Judge Robert H. Foerschler on September 9, 1997, came on for oral argument in Kansas City, Kansas.

### APPEARANCES

Claimant appeared by and through her attorney, Michael R. Wallace of Shawnee Mission, Kansas. The respondent a self-insured appeared by and through its attorney, Sean B. Summers of Kansas City, Missouri. The Kansas Workers Compensation Fund appeared by and through its attorney, Lynaia M. Holsapple of Kansas City, Kansas. There were no other appearances.

### RECORD AND STIPULATIONS

The record and stipulations as specifically set forth in the Award of the Administrative Law Judge are adopted by the Appeals Board.

### ISSUES

1. Did claimant meet with personal injury by accident arising out of and in the course of her employment on the date alleged?

2. The nature and extent of claimant's injury and/or disability as it relates to Fund liability.

3. Is the claimant entitled to penalties pursuant to K.S.A. 44-512b?

4. What, if any, is the liability of the Fund?

5. If the Fund has no liability, is it entitled to attorney's fees in this matter?

6. Are K.S.A. 44-501(c) and K.S.A. 44-510e(a)(1) unconstitutional as written or can they be applied to this matter?

7. Can the Administrative Law Judge or the Appeals Board take judicial notice of the AMA Guides to the Evaluation of Permanent Impairment in order to convert an upper extremity rating to a whole body rating?

The Administrative Law Judge found that respondent amended its pretrial stipulations regarding whether claimant met with personal injury by accident on April 12, 1994, and whether the injury arose out of and in the course of her employment. A review of the regular hearing transcript indicates that respondent's attorney intended to deny that claimant met with personal injury by accident on the dates alleged and that claimant's alleged accidental injuries arose out of and in the course of her employment. Therefore, these issues are before the Appeals Board. This denial by respondent resulted in claimant requesting penalties under K.S.A. 44-512b.

## FINDINGS OF FACT

On April 12, 1994, the claimant, a long term employee of respondent, slipped on a floor wet with diesel fuel and oil and fell on both knees. She reported the incident to her third shift foreman and, the next day, reported the injury to the company nurse, Elaine Perry. An accident report was prepared and given to the nurse and the claimant returned to work. The pain in claimant's knees continued to worsen and she returned to the nurse. She was sent to Occupational Medicine where she was provided a brace for her knees and shortly after referred to Dale Darnell, M.D., at the Dickson-Diveley Orthopedic Clinic.

Dr. Darnell first provided claimant physical therapy and performed a series of tests and eventually scheduled surgery on claimant's left knee. After the July 1994 surgery, claimant was off work for approximately five weeks and then returned to work. Claimant

continued having symptoms in the left knee and was referred to Dr. Steven T. Joyce an associate of Dr. Darnell. Dr. Joyce operated on claimant's right knee in May of 1995 and performed a second surgery on claimant's left knee in October 1995. He noted that claimant had chondromalacia which preexisted the 1994 fall.

Claimant did have a history of preexisting knee problems on the left side and had undergone surgery with Dr. Sheffer in April 1992. After that time she was returned to work with respondent in an unaccommodated position. The 1992 injury was a non work related injury occurring at claimant's home.

Dr. Joyce diagnosed chondromalacia and chondrolysis and assessed claimant a 15 percent impairment to each lower extremity. He felt that 10 to 12 percent of the chronic left knee chondromalacia stemmed from the preexisting condition and that an additional 3 percent existed as a result of the 1994 fall. He also diagnosed chondrolysis of the lateral tibia plateau, grade 4 which he felt occurred after the fall. He later reevaluated his percentages of impairment finding at least half of claimant's current left knee impairment resulted from the fall. He opined that of the 15 percent impairment assessed to the right knee, 5 percent preexisted the 1994 injury.

He opined that had claimant not had the degenerative changes in her knees she would not have been injured as severely from this fall.

Dr. Darnell felt claimant suffered a 10 percent impairment of function to each lower extremity but refused to speculate about any preexisting impairment to the left lower extremity. He did acknowledge that claimant's preexisting condition increased her chances of surgery resulting from this fall. He acknowledged that none of his impairment rating was attributable to any preexisting problems that claimant may have had.

Claimant was examined by Dr. Edward J. Prostic on August 15, 1996. Dr. Prostic acknowledged that claimant had a previous injury to her left knee and underwent surgery by Dr. Keith Sheffer on April 8, 1992. At that time she was diagnosed with advanced chondromalacia of the left patella. Claimant had an excellent recovery from that surgery and returned unrestricted to her work activities. Dr. Prostic also diagnosed significant degenerative changes in both knees and recommended claimant avoid lifting, pushing and pulling greater than 20 to 25 pounds, climbing, squatting, kneeling and recommended she be sedentary 40 to 50 percent of the time. He assessed claimant a 35 percent impairment of the left leg and 25 percent impairment to the right leg which, combined, equates to a 20 percent whole body functional impairment. He opined that between 5 and 10 percent of the left leg impairment preexisted the 1994 injury. He testified that the impairment from the 1994 fall would be in the 16 to 18 percent whole body range. He opined that it was likely claimant had some ongoing disease of the patella which is why he gave her a rating for a preexisting condition. He was unable to say that there was a preexisting disease in the right knee but did attribute 5 to 10 percent of the left knee impairment to claimant's weight, age, and the 1992 surgery.

Respondent took the deposition of Elaine Perry, respondent's nurse. Ms. Perry is a registered nurse working as the administrator of the medical department for respondent and is in charge of the workers compensation section. She acknowledged having a nurse's note entry of April 12, 1994, indicating claimant had slipped on oil and she referred claimant to Occupational Medicine as, in her opinion, it appeared to be a workers compensation claim. She also authorized workers compensation payment for the treatment. It was Ms. Perry who referred claimant to Dr. Darnell and later transferred her to Dr. Joyce for the authorized treatment including the surgeries.

Ms. Perry acknowledged being aware of claimant's prior 1992 left knee surgery with Dr. Sheffer but could not state specifically when she received his report. She acknowledged the 1992 injury was not work related. She further acknowledged there were no medical records for the period between claimant's return to work in 1992 and the 1994 date of accident, dealing with claimant's left knee.

## CONCLUSIONS OF LAW

The Appeals Board finds that claimant's testimony and the reports created at respondent's nurses station shortly after the incident are sufficient to justify finding that claimant has carried her burden in proving she suffered accidental injury arising out of and in the course of her employment with respondent on the date alleged. The fact that claimant suffered the fall and reported it in a very short period of time to both her supervisor and the plant nurse is convincing.

With regard to whether the K.S.A. 44-501(c) and K.S.A. 44-510e(a) are unconstitutional as written, the Appeals Board has declined in the past and continues to decline ruling on the issues dealing with the constitutionality of statutes. The Administrative Law Judge noted that while some constitutional challenges were asserted to these two statutes they were not extensively debated at the administrative stage of the proceedings and the ALJ made no decision regarding the constitutionality of these statutes. The Appeals Board will do likewise, but the issue remains for purposes of appeal, should the parties be so inclined.

With regard to the nature and extent of claimant's injury and/or disability, the Appeals Board finds that the Award of the Administrative Law Judge sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. The Appeals Board finds that claimant suffered a 16 percent impairment to the body as a whole resulting from both lower extremity injuries and that 2 percent of that impairment was preexisting.

Claimant contends she should be entitled to penalties under K.S.A. 44-512b. K.S.A. 44-512b states in part:

> Whenever the Administrative Law Judge or Board finds, upon a hearing conducted pursuant to K.S.A. 44-523 and amendments thereto or upon review or appeal of an award entered in such a hearing, that there was not just cause or excuse for the failure of the employer or insurance carrier to pay, prior to an award, the compensation claimed to the person entitled thereto, the employee shall be entitled to interest on the amount of the disability compensation found to be due and unpaid at the rate of interest prescribed pursuant to subsection (e)(1) of K.S.A. 16-204 and amendments thereto. Such interest shall be assessed against the employer or insurance carrier liable for the compensation and shall accrue from the date such compensation was due.

The Administrative Law Judge denied claimant's request for penalties finding that nature and extent was always in dispute in this situation and that the statute granted penalties only when there was no just cause or excuse for failure to pay the compensation claimed due. The Appeals Board agrees that the nature and extent of claimant's injury has been heavily litigated in this matter and there is a substantial difference of opinion among the various treating and evaluating physicians regarding what, if any, functional impairment claimant had and how much of that impairment would be preexisting. The Appeals Board finds the denial of penalties to claimant in this situation should be affirmed.

With regard to the liability of the Kansas Workers Compensation Fund the law in Kansas is well set out. Liability will be assessed against the Workers Compensation Fund when an employer shows that it knowingly hired or retained a handicapped employee who subsequently suffered a compensable work-related injury. An employee is handicapped under the act if the employee is afflicted with an impairment of such character as to constitute a handicap in obtaining or retaining employment. Carter v. Kansas Gas & Electric Co., 5 Kan. App. 2d 602, 621 P.2d 448 (1980). The determination as to whether a handicap exists and whether the employer had knowledge of that handicap is a question of fact and must be made on a case by case basis. Ramirez v. Rockwell Int'l, 10 Kan. App. 2d 403, 701 P.2d 336, (1985). The employer has the burden of proving that it knowingly hired or retained a handicapped employee. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

In this instance, the knowledge alleged by respondent comes through Elaine Perry, the plant nurse. While Ms. Perry acknowledges she was aware of claimant's 1992 surgery with Dr. Sheffer, she cannot testify as to when she became privy to that information. She does not know when she received Dr. Sheffer's 1992 surgical report and cannot testify whether that occurred before or after the 1994 injury. The Appeals Board acknowledges a possible scenario would be that Dr. Sheffer would provide the surgical notes to respondent as a form of release and return to work after the 1992 surgery. The Appeals Board also acknowledges that another possible scenario would be that respondent requested copies of Dr. Sheffer's reports after the 1994 injury. Without specific testimony verifying that respondent had this information in its possession before the 1994 injury, the

Appeals Board cannot find that the respondent has carried its burden of proving that it "knowingly" hired or retained a handicapped employee before the 1994 fall. Therefore, the Appeals Board finds that the Award of the Administrative Law Judge granting 50 percent of the liability against the Kansas Workers Compensation Fund is inappropriate and is reversed.

The Fund argues that the use by the Administrative Law Judge of the AMA Guides to convert an upper extremity rating to a whole body rating violates the rules of evidence. The Appeals Board disagrees. The evidence as to the upper extremity rating is a part of the record. The use of the AMA conversion chart does not add evidence to this record. The upper extremity rating was a part of the doctor's testimony and the ALJ followed the accepted procedure for converting an extremity rating to a general body rating. In addition, he used the procedure which the legislature in effect approved when it mandated use of the AMA Guides. K.S.A. 44-510e.

## AWARD

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that an award of compensation is granted herein in accordance with the above findings in favor of the claimant, Beverly D. McGrady and against the respondent Delphi Automotive Systems, a self-insured for accidental injuries sustained on April 12, 1994, for a 14 percent permanent partial general body disability.

Claimant is entitled 26.15 weeks temporary total disability compensation at the rate of $313 per week in the amount of $8184.95 followed by 56.54 weeks permanent partial disability compensation at the rate of $313 per week in the amount of $17,697.02 for a 14% permanent partial disability to the body as a whole making it a total award of $25,881.97. At the time of this award, the entire amount is due and owing in one lump sum less amounts previously paid.

The respondent is ordered to pay the bill of Dr. Bruce pursuant to the award of the Administrative Law Judge in the amount of $136.90.

Future medical for claimant's injuries may be awarded upon proper application to and approval by the director.

The Kansas Workers Compensation Fund has no liability in this matter with the exception of its own attorney's fees.

The fees and costs necessary for the administration of the Workers Compensation Act are hereby assessed against the respondent to be paid as follows:

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| Hostetler & Associates, Inc. | $649.60 |

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| Metropolitan Court Reporters, Inc. | $303.25 |
| Cross Reporting Service, Inc. | $442.10 |

**IT IS SO ORDERED.**

Dated this ____ day of April 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael R. Wallace, Shawnee Mission, KS
Sean B. Summers, Kansas City, MO
Lynaia M. Holsapple, Kansas City, KS
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director